Supreme Court, U.S.
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No. 92-366

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

FLORA ANN RUWITCH, TRUSTEE,
IRREVOCABLE INSURANCE TRUST AGREEMENT OF
WALLACE R. RUWITCH,
Petitioner,

v.

WILLIAM PENN LIFE ASSURANCE COMPANY
OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Eighth Circuit was correct in its *de novo* analysis of Missouri's common law of contracts when it concluded that Ruwitch's life insurance policy was not effective because the undisputed facts at trial demonstrated that Ruwitch failed to satisfy a condition precedent under the policy's "good health" clause.

RULE 29.1 LIST

Respondent William Penn Life Assurance Company of America is the wholly-owned subsidiary of Banner Life Insurance Company which is wholly-owned by Legal and General of America which is, in turn, wholly-owned by Legal and General, p.l.c., a British company. The business affairs of Respondent are currently conducted by another subsidiary of the Legal and General family of companies, William Penn Life Insurance Company of New York.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent William Penn Life Assurance Company of America ("Penn Life") respectfully prays that this Court deny the petition for writ of certiorari, seeking review of the Eighth Circuit's opinion in this case.

OPINIONS BELOW

Petitioner has attached, as Petitioner's Appendix B, the Eighth Circuit's Order denying the Trustee's Petition for Rehearing and Suggestion for Rehearing *en banc*. Petition at A-8. Petitioner, however, has attached an erroneous Order by the Court of Appeals which incorrectly shows that Chief Judge Richard S. Arnold voted

to grant rehearing. In fact, only Judge McMillian voted to grant rehearing. The erroneous Order cited by Petitioner was replaced by an Amended Order that is attached hereto as an Appendix to this Brief at p. 1a. The record, therefore, reflects that the panel unanimously denied the Petition for Rehearing, and the Court *en banc* denied the Petition for Rehearing by a vote of 10-1.

STATEMENT

Wallace Ruwitch was a wealthy and sophisticated businessman who applied for and received a $2,000,000 life insurance policy from Penn Life with a first year premium of $2,490.00. Penn Life's Appendix ("App.") filed with the Eighth Circuit Court of Appeals at 117, 187-190. Ruwitch decided to purchase the insurance after evaluating the results of his agent's analysis of policies offered by competing companies. App. at 77-78. Robert L. Rosenheim, Ruwitch's insurance agent, acknowledged that some companies have "better rates" and some have "better contracts." App. at 159. Ruwitch, however, decided to purchase the Penn Life policy based on its low cost, not its contractual provisions. App. at 77-78, 160. The beneficiary of the policy was designated as Wallace Ruwitch's irrevocable insurance trust agreement.

Ruwitch's life insurance policy contained an unambiguous "good health" clause that states as follows:

> [N]O INSURANCE SHALL TAKE EFFECT
>
> UNLESS AND UNTIL
>
> THE POLICY HAS BEEN PHYSICALLY DELIVERED
>
> AND THE FIRST FULL PREMIUM PAID
>
> DURING THE LIFETIME OF THE INSURED
>
> AND THEN ONLY IF THE PERSON TO BE INSURED
>
> IS ACTUALLY IN THE STATE OF HEALTH AND INSURABILITY
>
> REPRESENTED IN PARTS I AND II OF THIS APPLICATION.

App. at 130 (emphasis and diagramming added). *See also* Appendix to Petition for Writ of Certiorari ("Pet. App.") at A-3.

The undisputed facts are as follows:

1. Ruwitch had colon cancer in January, 1989, at least four months before he received his life insurance policy from Penn Life on May 25, 1989. App. at 182(A)-183, 198, 236-237, 240-241. Pet. App. at A-4.

2. Ruwitch represented to Penn Life on Part II of his life insurance application that he did not have cancer. App. at 131. Pet. App. at A-2.

3. Ruwitch died as a result of colon cancer on March 7, 1990, approximately ten months after he received his life insurance policy. App. at 238, 239, 241. Pet. App. at A-4.

The District Court denied, without comment, Respondent's motion for summary judgment, directed verdict, and judgment notwithstanding the verdict, each of which asked the Court to enforce the plain language of Ruwitch's insurance policy and hold that his insurance was not effective as a matter of law. Pet. App. at A-4, A-5. Respondent appealed the District Court's judgment that was based on a jury verdict for the plaintiff trustee.

Based on the uncontroverted facts adduced at trial and its *de novo* application of Missouri law, the Eighth Circuit held that the "good health" clause precluded Ruwitch's life insurance from being effective because Ruwitch was not "actually in the state of health" represented in the application. Pet. App. at A-5 to A-6. The Court, therefore, reversed the judgment and directed the District Court to enter judgment for Penn Life. Pet. App. at A-7.

REASONS WHY THE PETITION SHOULD BE DENIED

I. INTRODUCTION.

This case turns on the application of state common law to the unique facts presented at trial. No constitutional or federal question is presented. The Eighth Circuit opinion is well supported by Missouri law. There is no state or federal opinion that conflicts with the Eighth Circuit's holding. Moreover, this case does not involve any important policy or procedural issues.

If the Court reviews this case, hundreds and perhaps thousands of parties would seek review of decisions based solely on state law. This Court should not waste its precious and limited judicial resources to review a well reasoned opinion interpreting the "good health" clause of a life insurance contract based upon Missouri's common law. The Petition, therefore, should be denied.

II. THE EIGHTH CIRCUIT PROPERLY FOLLOWED *SALVE REGINA COLLEGE* IN ITS DE NOVO ANALYSIS OF MISSOURI LAW.

The Court of Appeals properly applied a *de novo* standard of review to the District Court's refusal to enforce the good health clause in Penn Life's life insurance contract. Pet. App. at A-5 (citing *Salve Regina College v. Russell*, 111 S. Ct. 1217, 1221 (1991)). This review was particularly appropriate in this case when the District Court failed to write an opinion or explain its decision on the record despite Penn Life's exhaustive analysis of its defense under the good health clause in its motions for summary judgment, directed verdict, and judgment notwithstanding the verdict. *See Salve Regina College*, 111 S. Ct. at 1222-1225. *See also id.* at 1222 ("Independent review, however, does not admit of unreflective reliance on a lower court's inarticulable intuitions.").

This Court should reject Petitioner's argument that the Eighth Circuit's application of *Salve Regina College* vio-

lates the *Erie* doctrine first enunciated by this Court in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). This Court's decision in *Salve Regina College* was firmly grounded in the principles enunciated earlier in *Erie*, which required that federal diversity courts follow state substantive law rather than an ephemeral "federal general common law." 304 U.S. at 74-76. As the Court observed, "appellate deference to the district court's determination of state law is inconsistent with the principles underlying this Court's decision in *Erie*." 111 S. Ct. at 1222. *Salve Regina College* furthers the aims of *Erie* by requiring a review of substantive state law principles at the appellate level to insure that the district courts are properly and uniformly adhering to state law. *Id.* at 1223-1224. This view is based, in part, on this Court's observation that, as compared with district courts, the courts of appeals are better positioned to address legal questions with the level of reflection and deliberation which such questions require. *Id.* at 1221.

This Court also should reject Petitioner's "alternative" suggestion that this Court should reconsider its March, 1991, decision in *Salve Regina College* and allow courts of appeals to grant some deference to the rulings of trial courts on matters of state law. This case demonstrates the reasons that *Salve Regina College* was correctly decided. The District Court did not file a written opinion or make a statement on the record explaining why it was refusing to enforce the "good health" clause in Ruwitch's life insurance policy. Thus, the Court of Appeals was compelled to conduct a *de novo* review because the District Court did not articulate a principled basis under Missouri law for its rejection of Respondent's contractual defense.

Furthermore, Petitioner's argument is irrelevant to the outcome of this case. Even under the law prior to *Salve Regina College*, the Court of Appeals would have been required to analyze Missouri law, enforce the terms of

the "good health" clause, and reverse the District Court's judgment. *See e.g., Salve Regina College*, 111 S. Ct. at 1220, 1221 (collecting cases); *Wilson v. Beloit Corp.*, 921 F.2d 765, 767 (8th Cir. 1990) (requiring Court of Appeals to overturn District Court's ruling on state law question if it is "fundamentally deficient in analysis, without a reasonable basis, or contrary to a reported state-court opinion").

III. THE EIGHTH CIRCUIT'S ENFORCEMENT OF THE "GOOD HEALTH" CLAUSE IN PENN LIFE'S INSURANCE POLICY IS REQUIRED BY THE OPINIONS OF THE MISSOURI SUPREME COURT AND THE MISSOURI COURT OF APPEALS.

The Eighth Circuit correctly observed that "Missouri courts recognize and enforce good health clauses in insurance contracts." Pet. App. at A-5, A-6. The controlling cases on which the Eighth Circuit relied include: *Kirk v. Metropolitan Life Insurance Co.*, 81 S.W.2d 333, 343 (Mo. 1935) ("The insurer agreed to assume liability only upon condition that the insured should *be*, not merely believe herself to be, in sound health. . . .") (emphasis in original); *Lipel v. General American Life Insurance Co.*, 192 S.W.2d 871 (Mo. Ct. App. 1946) (insurer's "good health" defense is based on whether insured is in fact in good health and not on whether the insured knew his representation was false); *Mahn v. American Life & Accident Insurance Co.*, 390 S.W.2d 573, 576 (Mo. Ct. App. 1965) ("'good health' clauses in life insurance policies are valid and are considered conditions precedent to the policy's becoming effective"); *Security Benefit Life Insurance Co. v. Jackson*, 318 F.2d 846, 850 (8th Cir. 1963) (applying Missouri law) ("[i]t makes no difference in the application of the good health clause whether or not the insured knew at the time the insurance became effective whether he had a disease which might contribute to his death.").

The Petitioner trustee cannot distinguish any of these controlling cases, which support the Eighth Circuit's hold-

ing that Penn Life is entitled to judgment as a matter of law. Indeed, the trustee does not cite any of these cases in her Petition to this Court. Instead, as will be demonstrated below, the trustee seeks review by this Court based on a string of inapposite cases that interpret insurance contracts that do not even contain a "good health" clause.

IV. THIS COURT SHOULD REJECT THE TRUSTEE'S CONSTRUCTION THEORY THAT NEGATES OR RENDERS SUPERFLUOUS THE "GOOD HEALTH" CLAUSE.

The premise of the trustee's construction theory is that the "good health" clause requires Penn Life to prove that Ruwitch knew he had cancer when he completed the insurance application. The plain language of the clause, however, does not require Penn Life to prove that Ruwitch had knowledge of his terminal illness. Pet. App. at A-7.

As reflected by the language of the good health clause, Penn Life only agreed to offer Ruwitch $2,000,000 of life insurance on the reasonable assumption that Ruwitch did not have a pre-existing terminal illness. The Court of Appeals correctly enforced the contractual bargain between the parties. The trustee is effectively requesting this Court to negate or refuse to enforce the "good health" clause. The Eighth Circuit properly refused to accept the trustee's theory that violates all accepted principles of contract law. Pet. App. at A-6.

The trustee argues that the words "represented . . . in the application" should be construed to make the good health clause operative only if Ruwitch knew that he had cancer when he completed the application. This construction is improper because it isolates the word "representation" and ignores the other words in the sentence that unambiguously state the policy only is effective if Ruwitch "*is actually in the state of health* represented in . . . the application." (emphasis added). The word "representa-

tion" is used merely as a reference to the specific statements of Ruwitch's health contained in the application.

The precise language in Ruwitch's policy is a substantial improvement over the language in some policies that require a determination of whether the insured is in "good health" when the policy is delivered. In close cases, the ambiguity of the phrase "good health" can create confusion for the court. But there can be no doubt what the parties intended in the case at bar. Ruwitch represented in his application that he did not have cancer. He was not "actually" in this "state of health" when the policy was delivered. The policy, therefore, was not effective.

The trustee also argues that the "good health" clause is modified by two independent provisions in the insurance contract. The first requires the insured to answer questions in the application "to the best of [his or her] knowledge and belief." The second provides that "[s]tatements made in the application will be considered representations and not warranties."

The "misrepresentation" provisions, however, constitute separate defenses that apply to circumstances that are different than those to which the "good health" clause applies. The good health clause, in which Ruwitch's knowledge of his cancer is not relevant, applies to Ruwitch's *present* state of health at the time the policy was *delivered* to him. *See* Pet. App. at A-3. On the other hand, the misrepresentation provisions, in which the issue of Ruwitch's knowledge of his cancer is relevant, apply to Ruwitch's *past* state of health at the time he *applied* for the life insurance.

The importance of these distinctions can be demonstrated by considering hypothetical applications of Penn Life's good health clause and misrepresentations defenses. For example, suppose that an insured had cancer that had been cured or an ulcer that had healed but did not disclose this information in the insurance application.

Penn Life would not have a defense under the "good health" clause because when the policy was delivered, the insured was "actually" in the state of health represented in the application—that is, cancer-free or ulcer-free. Penn Life, however, would have a viable misrepresentation defense to void the policy based on the insured's material misrepresentation of important past (as opposed to present) health information.

Timing is also critical to Penn Life's good health clause defense as compared with its separate misrepresentation defense. The "good health" clause applies to Ruwitch's "actual state of health" when the policy is *delivered*, not when Ruwitch represented his health at the time he completed the application. When Ruwitch signed his insurance application, it would have been logically impossible for him to know with certainty the state of his health in the future when he anticipated receiving the life insurance policy. Yet the trustee's construction of the "good health" clause would permit Ruwitch to have such superhuman knowledge of the future.

In *Lipel v. General American Life Insurance Co.*, the Missouri Court of Appeals recognized the difference between a good health clause and a separate "misrepresentation not warranty" provision in a life insurance policy. 871 S.W.2d at 875. Rejecting the identical construction theory the trustee is proposing, the Court held that "this ["misrepresentation not warranty" provision] in no manner adds to or takes from the 'sound health' clause. . . ." *Id.* The Eighth Circuit properly followed this controlling precedent, which the trustee does not discuss in her Petition. Pet. App. at A-6, A-7.

The trustee complains that the Eighth Circuit erred when it concluded that "[w]e do not believe that designation of the good health clause in this contract as either a warranty or a condition precedent will make a difference in the outcome in our decision." Pet. App. at A-6. The Eighth Circuit's conclusion, however, was sensible and

well supported by the relevant case-law ignored entirely by the trustee. *Id.* (citing case-law). The failure to satisfy a condition precedent is similar to a warranty in that in both instances the prospective insured's knowledge of his terminal illness is not relevant.

The Eighth Circuit's opinion is consistent with the only other court that has interpreted the unique "good health" clause in Ruwitch's life insurance policy. *William Penn Life Assurance Co. of America v. Brown Transfer and Storage Co. Inc.*, No. 88-6080-SJ-6 (W.D. Mo. January 1990) (on file with the Eighth Circuit Clerk). Relying on the unambiguous language of the "good health" and Missouri cases such as *Kirk* and *Lipel*, Chief District Judge Sachs adopted a construction analysis that mirrors the Eighth Circuit's holding in this appeal. *Id.* The Court also rejected the same construction theory proposed by the trustee. *Id.*

V. THE TRUSTEE RELIES ON NUMEROUS INAPPOSITE CASES THAT INVOLVE INSURANCE CONTRACTS THAT DO NOT EVEN CONTAIN A "GOOD HEALTH" CLAUSE.

The trustee does not cite a single case in Missouri or any other jurisdiction that supports her theory that an insurer's misrepresentation defense can be construed to modify its separate contractual defense under a "good health" clause. In fact, nearly every case cited in the trustee's Petition involves insurance contracts that do not even contain a "good health" clause. For example, Petitioner cites this Court's 1884 decision that interprets a Pennsylvania insurance contract that did not have a "good health" clause. *Moulor v. American Life Insurance Co.*, 111 U.S. 335 (1884).

Likewise, none of the other Eighth Circuit cases cited by Petitioner construe contracts that have a "good health" clause. *New York Life Insurance Co. v. Calhoun*, 97 F.2d 896 (8th Cir. 1938); *Howard v. Russell Stover Candies*,

649 F.2d 620 (8th Cir. 1981) (interpreting a general liability insurance policy); *Hampton Foods, Inc. v. Aetna Casualty and Surety Co.*, 787 F.2d 349 (8th Cir. 1986) (interpreting a personal property insurance policy).

Petitioner cites five Missouri cases but not one of these cases construes a life insurance policy containing a "good health" clause. *See, e.g., Houston v. Metropolitan Life Insurance Co.*, 97 S.W.2d 856 (Mo. Ct. App. 1936); *Cohen v. Metropolitan Life Insurance Co.*, 444 S.W.2d 498 (Mo. Ct. App. 1969); *Scheutzel v. Grand Aerie Fraternal Order of Eagles*, 164 S.W.2d 135 (Mo. Ct. App. 1942); *Dixon v. Business Men's Assurance Co.*, 285 S.W.2d 619 (Mo. 1955) (*en banc*); *Bohm v. Fidelity and Casualty Co. of New York*, 399 S.W.2d 450 (Mo. Ct. App. 1966).

Petitioner's reliance upon *William Penn Life Insurance Co. v. Sands*, 912 F.2d 1359 (11th Cir. 1990) is similarly misplaced. The Court's opinion interprets Florida, not Missouri law, and it does not construe or reference a "good health" clause at issue in the case at bar. *See also Skinner v. Aetna Life and Casualty*, 804 F.2d 148 (D.C. Cir. 1986) (applying D.C. law).

There are no opinions of this Court that have any relevance to the issue of Missouri law in this case involving the meaning and enforcement of a "good health" clause in a life insurance contract. The trustee chose not to mention the one Eighth Circuit opinion which is relevant to the instant appeal. *Security Benefit Life Insurance Co. v. Jackson*, 318 F.2d 846 (8th Cir. 1963) (construing good health clause in life insurance policy and applying Missouri law). This case directly supports the holding below that is based on the unambiguous language of the good health clause, the relevant Missouri case-law, and the undisputed fact that Ruwitch had cancer several months before the policy was delivered to him. Penn Life, therefore, is entitled to a judgment as a matter of law. *Id.* at 850-852. *See also* Pet. App. at A-6, A-7.

VI. PETITIONER HAS WAIVED HER ARGUMENT THAT THE POLICY AT ISSUE WAS AMBIGUOUS; IN ANY EVENT, THE ARGUMENT HAS NO MERIT.

The trustee errs in not focusing on the panel's holding that "[w]hen the contract is read as a whole, however, it is clear that it was Penn Life's intent to make the effectiveness of the policy conditional on the delivery of the policy while Ruwitch was still alive and in good health." Pet. App. at A-6, A-7.

The trustee requests the panel to set aside its decision to enforce the plain language of the good faith clause and instead conclude that the clause is ambiguous and should be construed against Penn Life. This Court should not consider the trustee's new argument on appeal. *See, e.g., Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2921 (1989); *Kapp v. Naturelle, Inc.*, 611 F.2d 703, 709 (8th Cir. 1979).

Penn Life had no notice of the issue in the pre-trial proceedings and therefore had no reason to develop an evidentiary record of the parol evidence that would have been admissible at trial if the jury had been permitted to resolve the alleged ambiguity. Penn Life, therefore, would be prejudiced if this Court permitted plaintiff to raise the ambiguity issue on appeal. Even if considered, however, the trustee's argument should be rejected because it is premised on a legally unacceptable argument that would permit the Court to negate or render superfluous the unambiguous good health clause in the life insurance contract. *See* Pet. App. at 7.

In addition, Petitioner urges, for the first time, that the Court of Appeals did not apply Missouri's so-called "reasonable expectations" doctrine to this case. This Court should reject this ground for review because it was not properly presented in the lower courts. *Browning-Ferris Industries*, 109 S. Ct. at 2921. In any event, there is no merit to Petitioner's argument because the doctrine does

not apply to negate the enforcement of the unambiguous language of an insurance policy.

The new cases cited by Petitioner are also inapposite. *Estrin Construction Co., Inc. v. Aetna Casualty and Surety Co.*, 612 S.W.2d 413 (Mo. Ct. App. 1981) involved a question regarding the insurer's duty to defend under a Comprehensive General Liability policy, not a life insurance contract with a "good health" clause. The *Estrin* Court used the "reasonable expectations" doctrine to overcome an acknowledged ambiguity in the policy on the basis that the insured had no reasonable expectation that there was coverage. *Id.* at 420. In contrast, the "good health" clause in Ruwitch's life insurance policy is not ambiguous and must be enforced.

Petitioner further attempts to support her new theory of recovery by citing *Rodriguez v. General Accident Insurance Co.*, 808 S.W.2d 379 (Mo. 1991) (*en banc*) and *Robin v. Blue Cross Hospital Services, Inc.*, 637 S.W.2d 695 (Mo. 1982) (*en banc*). These cases, however, are inapposite because the Missouri Supreme Court refused to apply the "reasonable expectations" doctrine.

The Eighth Circuit's well-reasoned opinion is supported by the unique facts of this case and Missouri's common law principles that enforce "good health" clauses in life insurance contracts. *See Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) ("We emphasize, however, that, standing alone, a challenge to state law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review."). No principled basis exists for this Court to review the judgment of the Court of Appeals.

CONCLUSION

For these reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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September 22, 1992

APPENDIX

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-2943EM

FLORA ANN RUWITCH, TRUSTEE,
Appellee,

vs.

WILLIAM PENN LIFE ASSURANCE
COMPANY OF AMERICA,
Appellant.

Order Denying Petition for Rehearing and
Suggestion for Rehearing En Banc

AMENDED ORDER

The court's order of July 7, 1992, is amended as follows:

The suggestion for rehearing en banc is denied. Judge McMillian would grant the suggestion for rehearing en banc.

The petition for rehearing is also denied.

July 10, 1992

Order Entered at the Direction of the Court:

s/ Michael E. Gans
Clerk
U.S. Court of Appeals
Eighth Circuit